# Petition

# 81-1563

Office - Supreme Court, U.S.
FILED
JAN 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

| | |
|---|---|
| THE SACRAMENTO BEE, published by McClatchy Newspapers,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION,<br><br>Respondent.<br><br>UNITED STATES OF AMERICA, WILLIAM DALE SMITH, CHERYL BICKFORD, JAMES CAMERON, JULIUS FISHERMAN, NORMAN HEIFNER, ANDREW POPE, and NORMAN TRUAX,<br><br>Real Parties In Interest. | PETITION FOR WRIT OF CERTIORARI to<br><br>United States Court of Appeals for the Ninth Circuit) |

DOUGLAS T. FOSTER
Legal Counsel
McClatchy Newspapers
P. O. Box 15779
Sacramento, CA 95813
(916) 446-9211

Attorney for Petitioner The Sacramento Bee

## QUESTIONS PRESENTED

(1) May a United States District Court exclude the press from portions of an ongoing criminal trial, in preference to other alternatives including sequestering the jury, to protect the jury from exposure to news reports of the trial?

(2) May a United States Distict Court exclude the press but not members of the public from portions of an ongoing criminal trial?

(3) May a United States District Court issue its order excluding the press without prior notice to the press and an opportunity for a hearing?

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

| | |
|---|---|
| THE SACRAMENTO BEE, published by McClatchy Newspapers,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION,<br><br>Respondent.<br><br>UNITED STATES OF AMERICA, WILLIAM DALE SMITH, CHERYL BICKFORD, JAMES CAMERON, JULIUS FISHERMAN, NORMAN HEIFNER, ANDREW POPE, and NORMAN TRUAX,<br><br>Real Parties In Interest. | PETITION FOR WRIT OF CERTIORARI to<br><br>United States Court of Appeals for the Ninth Circuit) |

DOUGLAS T. FOSTER
Legal Counsel
McClatchy Newspapers
P. O. Box 15779
Sacramento, CA 95813
(916) 446-9211

Attorney for Petitioner The Sacramento Bee

## TOPICAL INDEX


Opinions Below..... 2

Jurisdiction..... 3

Questions Presented..... 4

Constitutional Provision Invoked..... 4

Statement of the Case..... 5

Reasons for Granting the Writ..... 10

I. EXCLUSION OF THE PRESS FROM A CRIMINAL TRIAL VIOLATES THE FIRST AMENDMENT..... 10

II. THE NINTH CIRCUIT'S ALTERNATIVE OF CONDITIONING PRESS ATTENDANCE AT THE TRIAL ON A VOLUNTARY AGREEMENT AS TO TIMING AND SCOPE OF NEWS COVERAGE VIOLATES ESTABLISHED FIRST AMENDMENT PRINCIPLES..... 13

III. EXCLUSION OF THE PRESS BUT NOT THE PUBLIC NOT ONLY VIOLATES THE FIRST AMENDMENT BUT ALSO DEFEATS THE PURPOSE OF THE EXCLUSION ORDERS..... 18

IV. SUPREME COURT DIRECTION OF THE PROCEDURES TO BE FOLLOWED IN ISSUANCE OF ORDERS AFFECTING FIRST AMENDMENT RIGHTS IS NECESSARY..... 22

Conclusion..... 33

Appendix

Opinion of the United States Court of Appeals for the Ninth Circuit, September 14, 1981, as corrected on denial of rehearing on November 6, 1981..... 1

Excerpt of Daily Reporter's Transcript before the United States District Court: April 3, 1981 (First Exclusion of the News Media)..... 24

Excerpt of Daily Reporter's Transcript before the United States District Court: April 7, 1981 (Second Exclusion of the News Media)..... 29

Excerpt of Daily Reporter's Transcript before the United States District Court: April 8, 1981 (Arguments and Ruling on Exclusion)..... 34

Excerpt of Daily Reporter's Transcript before the United States District Court: April 10, 1981 (Arguments and Ruling on Exclusion)..... 59

TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980), aff'd, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)..... | 17 |
| Boulden v. Holman, 394 U.S. 478 (1969)..... | 29 |
| Branzburg v. Hayes, 408 U.S. 665 (1972)..... | 11, 19 |
| Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968)..... | 21, 25, 28 |
| Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)..... | 20 |
| Estes v. Texas, 381 U.S. 532 (1965)..... | 18 |
| First National Bank v. Bellotti, 435 U.S. 765 (1978)..... | 6 |
| Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926)..... | 15 |
| Gannett Co. v. DePasquale, 443 U.S. 368 (1979)..... | 6, 12, 26 |
| Geise v. United States, 262 F.2d 151 (9th Cir. 1958), rehearing denied, 265 F.2d 659 (9th Cir.), cert. denied, 361 U.S. 842 (1959)..... | 22 |

Page

In re Halkin,
598 F.2d 176 (D.C. Cir. 1979)... 17

Heller v. New York,
413 U.S. 483 (1973)..... 26

Landmark Communications, Inc.
v. Virginia,
435 U.S. 829 (1978)..... 32

Maxwell v. Bishop,
398 U.S. 262 (1970)..... 29

Nebraska Press Ass'n v. Stuart, 6,12,17,
427 U.S. 539 (1976)..... 20, 23

Nixon v. Warner Communications,
Inc., 435 U.S. 589 (1978)..... 18

Oklahoma Publishing Co. v.
District Court,
430 U.S. 308 (1977)..... 20

Opper v. United States,
384 U.S. 84 (1954)..... 29

Paoli v. United States,
352 U.S. 232 (1957)..... 29

Richmond Newspapers, Inc. v. 6,11,12,18,
Virginia, 448 U.S. 555 (1980)... 21,28

Rosen v. Port of Portland,
641 F.2d 1243 (9th Cir. 1981)... 17

Sheppard v. Maxwell,
384 U.S. 333 (1966)..... 12, 20

Sherbert v. Verner,
374 U.S. 398 (1963)..... 15

Page

Speiser v. Randall,
357 U.S. 513 (1958)..... 15

United States ex. rel. Latimore
v. Sielaff, 561 F.2d 691
(7th Cir. 1977), cert. denied,
434 U.S. 1076 (1978)..... 22

United States v. Chicago,
M., St. P. & P.R.R.,
282 U.S. 311 (1931)..... 15

United States v. Clardy,
540 F.2d 439 (9th Cir.),
cert. denied, 429 U.S.
963 (1976)..... 29

United States v. Dickinson,
465 F.2d 496 (5th Cir. 1972),
further appeal, 476 F.2d 373
(5th Cir.), cert. denied,
414 U.S. 979 (1973)..... 17

United States v. Eisner,
533 F.2d 987 (6th Cir.),
cert. denied, 429 U.S.
919 (1976)..... 22

United States v. Kampiles,
609 F.2d 1233 (7th Cir. 1979),
cert. denied, 446 U.S. 954
(1980)..... 29

United States v. Polizzi,
500 F.2d 856 (9th Cir. 1974),
cert. denied, 419 U.S. 1120
(1975), further appeal, 550
F.2d 1133 (9th Cir. 1976)..... 29

United States v. Sherman,
581 F.2d 1358 (9th Cir. 1978)... 33

Page

Wheeler v. United States, 640 F.2d 1116 (9th Cir. 1981)... 26, 33

OTHER AUTHORITIES

U.S. Constitution, First Amendment..... 4-5

28 U.S.C. § 1254(1)..... 4

E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 10.03, 10.16-.18, 11.11 (3d ed. 1977)..... 31-32

ABA Project on Standards for Criminal Justice, Fair Trial and Free Press Standards 8-3.2, 8-3.6 (1980)..... 14

Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935)..... 15

Annot., 44 L. Ed. 2d 745 (1976)..... 6

Annot., 61 L. Ed. 2d 1018 (1979)..... 22

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

| | |
|---|---|
| THE SACRAMENTO BEE, published by McCLATCHY Newspapers,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION,<br><br>Respondent.<br><br>UNITED STATES OF AMERICA, WILLIAM DALE SMITH, CHERYL BICKFORD, JAMES CAMERON, JULIUS FISHERMAN, NORMAN HEIFNER, ANDREW POPE, and NORMAN TRUAX,<br><br>Real Parties In Interest. | PETITION FOR WRIT OF CERTIORARI to United States Court of Appeals for the Ninth Circuit |

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Sacramento Bee, the petitioner herein,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 14, 1981.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 656 F.2d 477 (9th Cir. 1981),

---

[1] In compliance with Rule 28.1 of the Rules of the Supreme Court, Petitioner provides the following listing of its subsidiaries and affiliates. Newspaper Interests: McClatchy Newspapers; Anchorage Daily News, Inc.; El Dorado Newspapers; Gavilan Newspapers, Inc.; Homac Publishing, and News Review Publishing Co., Inc. Cable Television Interests: Pacific Cablevision; Fresno Cable TV, Ltd.; Nor Cal Cablevision, Inc.; Sequoia Cablevision, Inc. Broadcast Interests: KFBK (AM) Sacramento, California; KAER (FM) Sacramento, California; KBEE (AM) Modesto, California; KBEE (FM) Modesto, California; KMJ (AM) Fresno, California; KNAX (FM) Fresno, California; KOH (AM) Reno, Nevada; KNEV (FM) Reno, Nevada.

and is reproduced in the Appendix hereto at pages 1 through 23. The Sacramento Bee timely filed a petition for rehearing which was denied by the United States Court of Appeals for the Ninth Circuit on November 6, 1981.

The rulings of the United States District Court for the Eastern District of California appear only in the Reporter's Daily Transcripts. All pertinent portions thereof are reproduced in the Appendix hereto at pages 24 through 91.

## JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 14, 1981. A timely petition for rehearing was denied on November 6, 1981. The jurisdiction of

the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

(1) May a United States District Court exclude the press from portions of an ongoing criminal trial, in preference to other alternatives including sequestering the jury, to protect the jury from exposure to news reports of the trial?

(2) May a United States Distict Court exclude the press but not members of the public from portions of an ongoing criminal trial?

(3) May a United States District Court issue its order excluding the press without prior notice to the press and an opportunity for a hearing?

## CONSTITUTIONAL PROVISION INVOLVED

This case involves that portion of the First Amendment to the Constitution

of the United States which provides as follows:

> Congress shall make no law ... abridging the freedom ... of the press ....

## STATEMENT OF THE CASE

On at least two occasions during the criminal trial in United States v. Smith, CR No. S-80-118-LKK, the United States District Court for the Eastern District of California ordered all news reporters excluded from the courtroom in order that evidence presented and discussed outside the presence of the jury might not be reported in the press.[2] See Appendix at 24

---

[2] In referring to the "press," Petitioner uses the word as a term of art encompassing all forms of news reporting.

The criminal trial in question arose from a multi-count indictment charging over 20 persons with international heroin dealings and other violations of federal law. Trial of seven of the defendants commenced in March 1981 and was completed in May 1981. Although that trial has

through 33. The trial court stated its rationale for these exclusions on April 7, 1981, at the time of the second exclusion:

> The Court has been moved by the Defendants to sequester the jury; the Court has been requested to do other terribly extreme things, the Court has declined to do that; the Court has been asked to exclude the press each and every time there is an out-of-the-jury-presence motion, the Court has refused to do that. The Court has told the defendants that it will consider on a motion-by-motion basis the exclusion of the media. We have already lost one juror who read an article concerning evidence which was not properly before the jury.

---

been completed, this case is not moot because the challenged actions of the trial court were too short-lived to permit full litigation prior to termination of the trial and there is a reasonable expectation that Petitioner's news reporters will be subjected to similar exclusions in the future. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 377-78 (1979); First National Bank v. Bellotti, 435 U.S. 765, 774 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976); Annot., 44 L. Ed. 2d 745, 754-55 (1976).

> I do not intend to take the chance again. Where there is substantial possibility that evidence will not be put before the jury, I don't want them to get it indirectly through the media.

See Appendix at 31 through 32.[3] Based on this reasoning, the trial court ordered all news reporters to vacate the courtroom, although members of the public were permitted to remain.

On April 8 and 10, 1981, attorneys for Petitioner urged the trial court to reconsider both the reasoning underlying its exclusion of the press and the court's stated intention to exclude the press on future occasions. See Appendix at 34 through 91. The trial court restated its conclusion that such exclusions of the press are proper, rejecting

---

[3] Although one juror had been excused, three alternate jurors remained when the trial court excluded the press on April 3 and 7, 1981.

the alternatives of clipping newspapers and additional admonitions to and sequestration of the jury.

The Petitioner filed a petition for writ of mandate in the United States Court of Appeals for the Ninth Circuit on April 24, 1981. Oral arguments were heard on July 5, 1981, and the Ninth Circuit issued its opinion on September 14, 1981, denying the petition. See Appendix at 1 through 23. The court ruled:

> Although we conclude that preferable alternatives to closure exist, the judge's failure to consider them in the middle of a long and difficult criminal trial does not present such clear error as to warrant the grant of the extraordinary writ of mandamus.

The preferable alternative suggested was a "voluntary agreement" by the press not to publish information revealed during

those portions of the trial that would otherwise be closed.

The Petitioner sought a rehearing on September 24, 1981, urging that exclusions of the press are most likely to arise during difficult trials so that their timing should not reduce the level of appellate scrutiny and that the voluntary agreement alternative was contrary to established First Amendment principles. In early November 1981, The Times Mirror, publisher of the Los Angeles Times, lodged a brief amicus curiae in support of rehearing and rehearing en banc. On November 6, 1981, the Ninth Circuit denied leave to file the brief amicus curiae and denied the petition for rehearing and rehearing en banc, making a minor correction in its original opinion.

## REASONS FOR GRANTING THE WRIT

### I.

### EXCLUSION OF THE PRESS FROM A CRIMINAL TRIAL VIOLATES THE FIRST AMENDMENT

Commencement of a criminal trial when a jury is impaneled terminates the complex pre-trial balancing of the First Amendment rights of the press against the constitutional rights of the defendant. Once impaneled, the jury may be sequestered if the variety of less stringent means of protecting the defendant from publicity are found inadequate. Sequestration of the jury, although inconvenient for both the jurors and the government, does not impinge upon any constitutional rights. Thus, when the trial court decides that only closure of the trial or sequestration of the jury will suffice to protect the defendant, the balance must be drawn between First

Amendment rights and convenience, not between competing constitutional rights. When only one constitutional right is at stake, it should not be infringed to serve a nonconstitutional goal.

A trial courtroom is a public place where the public and the press have a constitutional right to be present:

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980), quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (footnote omitted).

This Court's decisions have repeatedly indicated that sequestration of the jury is preferable to infringement of First Amendment rights. Thus, the recent decision in Richmond Newspapers, Inc. v.

Virginia, 448 U.S. 555, 581 (1980), declares that, once trial has begun, there exist "various tested alternatives to satisfy the constitutional demands of fairness":

> There was no suggestion that ... sequestration of the jurors would not have guarded against their being subjected to improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.

Id. (footnote omitted, emphasis added).[4]

---

[4] See also Gannett Co. v. DePasquale, 443 U.S. 368, 378 & n.5 (1979) ("after the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means .... [A] trial judge may order sequestration of the jury or take any of a variety of protective measures."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976) ("Sequestration of jurors is, of course, always available."); Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("sequestration of the jury was something the judge should have raised sua sponte with counsel.").

Neither the Ninth Circuit's decision denying the petition for writ of mandate in this case nor the statements of the trial court reveal an "overriding interest" sufficient to justify exclusion of the press from the trial. Instead, the only interests served by exclusion were the convenience of the jury and avoidance of expense to the government. While these interests may properly be weighed in the balance against other interests not founded in the Constitution, they are insufficient to justify infringement of First Amendment rights.

## II.

## THE NINTH CIRCUIT'S ALTERNATIVE OF CONDITIONING PRESS ATTENDANCE AT THE TRIAL ON A VOLUNTARY AGREEMENT AS TO TIMING AND SCOPE OF NEWS COVERAGE VIOLATES ESTABLISHED FIRST AMENDMENT PRINCIPLES

The "preferable" alternative to exclusion of the press suggested by the

Ninth Circuit, namely, that the trial court should seek a voluntary agreement with the press about the timing and scope of coverage, is contrary to established First Amendment principles.[5] As an initial matter, a court's action in permitting press attendance at a criminal trial upon the "voluntary" agreement of the press to postpone or alter coverage

---

[5] The only authority cited by the Ninth Circuit was the ABA Project on Standards for Criminal Justice, Fair Trial and Free Press Standard 8-3.6 (1980). That Standard, applicable to trials, provides no support for the court's suggested alternative. Standard 8-3.2, applicable to pre-trial proceedings, does include a provision for the trial court to seek a voluntary agreement with the press. Standard 8-3.2 is expressly inapplicable to trials, however, because the alternatives of admonitions, clipping newspapers and sequestration are available once the jury has been impaneled. Moreover, Standard 8-3.2 provides that even pre-trial hearings shall not be closed unless the dissemination of the information from the hearing would create a clear and present danger to the fairness of the trial--a far more stringent standard than that adopted by the Ninth Circuit for closure of the actual trial.

of the trial impermissibly conditions the exercise of one constitutional right--attendance at the trial--on the waiver of another constitutional right--the freedom of the press to report newsworthy events. The imposition of such conditions on the exercise of constitutional rights has been condemned whenever it has appeared, whether the burdened right arose from the First Amendment or another constitutional source.[6]

Additional problems with the suggested voluntary agreement appear when enforcement is considered. If the agreement is truly voluntary, not subject to

---

[6] E.g., Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); United States v. Chicago, M., St. P. & P.R.R., 282 U.S. 311 (1931); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935).

judicial enforcement, then the clear danger exists that news reports will contain references to the forbidden evidence; such news reports could derive from information supplied by the non-press members of the audience to the excluded representatives of the press who had not agreed to defer or alter coverage. As a practical matter, this obvious danger is most acute when the information is particularly damaging to the defendant. Thus, the voluntary agreement alternative cannot provide adequate protection for criminal defendants, yet their protection is the only justification for the significant infringement of First Amendment rights at issue. If the agreement is to be enforceable, presumably through the use of the court's contempt powers, then it necessarily constitutes a prior restraint forbidden by the

First Amendment.[7]

The voluntary agreement alternative adopted by the Ninth Circuit is not supported by decisions of this Court. Absent review by this Court, the United States District Courts in the Ninth Circuit are bound to follow the voluntary agreement alternative, and other federal

---

[7] See generally Rosen v. Port of Portland, 641 F.2d 1243, 1246-47 (9th Cir. 1981); Bernard v. Gulf Oil Co., 619 F.2d 459, 468 (5th Cir. 1980) (en banc), aff'd, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981); In re Halkin, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979).

In the instant case, the Ninth Circuit cited the "easy solution ... to acknowledge that immediate publication was unnecessary." See Appendix at 19. This suggestion is neither easy nor a solution. As noted in United States v. Dickinson, 465 F.2d 496, 512 (5th Cir. 1972), further appeal, 476 F.2d 373 (5th Cir.) (per curiam), cert. denied, 414 U.S. 979 (1973): "Timeliness of publication is the hallmark of 'news' and the difference between 'news' and 'history' is merely a matter of hours." The offensiveness of a restraint on First Amendment rights is not reduced by its temporary nature. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

and state courts are likely to follow it, resulting in significant infringement of First Amendment rights.

## III.

## EXCLUSION OF THE PRESS BUT NOT THE PUBLIC NOT ONLY VIOLATES THE FIRST AMENDMENT BUT ALSO DEFEATS THE PURPOSE OF THE EXCLUSION ORDERS

Although this Court has declined to rule that the First Amendment grants the press a right of access to trials superior to that of the general public, a number of decisions hold that the rights of the press are at least equal to those of the public.[8] In the instant case, the

---

[8] E.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 n.12 (1980) (representatives of the media "'are entitled to the same rights [to attend trials] as the general public.'"), quoting Estes v. Texas, 381 U.S. 532, 540 (1965); Richmond Newspapers, Inc. v. Virginia, supra at 586 n.2 (Brennan & Marshall, JJ., concurring) ("the media's right of access is at least equal to that of the general public"); Nixon v. Warner Communications, Inc., 435 U.S. 589, 609

trial court excluded the press but not the public. In excluding only the press, the trial court not only violated the First Amendment, but it also defeated the stated justification for excluding the press.

The trial court based its exclusion orders on the assumptions that, but for exclusion of the press, the information revealed during the closed proceedings might be printed or reported in the news, one or more of the jurors might learn of it, contrary to the court's express instructions, and the jurors might breach their oaths as jurors to decide the issues on the evidence presented at trial in conformity with the instructions of the court. Exclusion of the press but not the public defeats the purpose of such an exclusion. Even if the press is

(1978); Branzburg v. Hayes, 408 U.S. 665, 684-83 (1972).

excluded from the courtroom, members of the public who hear the evidence and arguments presented outside the presence of the jury may then be questioned by the press following the closed proceedings. No injunction could properly be placed on members of the public to forbid them from revealing what they heard while the press was excluded.[9]

Orders affecting or impairing First

---

[9] Any such injunction, of course, would constitute a prior restraint, contrary to the numerous decisions of this Court holding that a trial court has no authority

> to suppress publication of information from the hearing [in a criminal case] if the public was allowed to attend: "[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."

Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311 (1977) (per curiam), quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568 (1976). See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-96 (1975); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).

Amendment rights "must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order." Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 183 (1968). By permitting the public to remain in the courtroom, the trial court may have sought to reduce the infringement of the First Amendment necessarily caused by exclusion of the press.[10] Yet its decision

---

[10] The Petitioner believes that no order excluding the press but not the public can be constitutionally permissible. Such an order has an insidious effect in that a trial court faced with a request for exclusion of the press may discount the infringment of First Amendment rights created by the exclusion through the rationalization that permitting the public to remain lessens the impairment of First Amendment rights. This rationalization is only illusory given the public reliance on news reports of current events. As this Court has expressly recognized, the press today is the surrogate of the public. Richmond Newspapers, Inc. v. Virginia, 448 U.S.

to permit the public to remain forfeited even the faulty justification on which exclusion was based. At the very least, an order infringing First Amendment rights must be designed to serve the purpose underlying the order.[11]

## IV.

## SUPREME COURT DIRECTION OF THE PROCEDURES TO BE FOLLOWED IN ISSUANCE OF ORDERS AFFECTING FIRST AMENDMENT RIGHTS IS NECESSARY

The instant case affords an opportunity for this Court to provide needed

---

555, 573 (1980). Furthermore, such a sanctioned practice would increase the likelihood of court closures and further infringement of First Amendment rights.

[11] See, e.g., Annot., 61 L. Ed. 2d 1018, 1037-38 (1979); United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 694-96 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978); United States v. Eisner, 533 F.2d 987, 993-94 (6th Cir.), cert. denied, 429 U.S. 919 (1976); and Geise v. United States, 262 F.2d 151 (9th Cir. 1958), rehearing denied, 265 F.2d 659 (9th Cir.), cert. denied, 361 U.S. 842 (1959).

direction to the United States District Courts concerning procedures to be followed in reaching decisions and issuing orders affecting the First Amendment rights of the press. In this case, the trial court excluded the press on April 3, 1981, providing virtually no explanation of the reasons underlying its order. See Appendix at 24 through 28. At the time of the second exclusion order, the trial court explained the rationale for its order only in response to a question posed by a news reporter. See Appendix at 29 through 33. At no time prior to these exclusions was Petitioner or, so far as Petitioner is aware, other news media informed that a decision to close the court during the trial was being considered. Petitioner would have presented briefing and oral arguments had the opportunity been offered prior to the decision, just as Petitioner requested

leave to present arguments after the decision was made.

Unless the circumstances are unusually compelling, and they were not so compelling in the instant case, no decision that so clearly implicates the First Amendment freedom of the press should be made without at least a hearing at which arguments concerning the effect of the proposed order may be considered and alternatives discussed. Under the approach taken in the instant case, the press first learned of the decision when it was a fait accompli. The effect of the oral arguments permitted thereafter was seriously diminished.[12]

---

[12] The record in the instant case is unclear whether there was a conference in chambers attended by the parties to the trial at which the question of exclusion of the press was discussed. The trial court's statements on April 7, 1981 appear to so indicate. See Appendix at 32. A conference attended by counsel for the United States and the defendants is

As explained in a decision involving different facts, but the same underlying principles,

> [the] order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 180

---

wholly inadequate, however, to protect the First Amendment rights of the press. In this instance, the United States initially took no position on the decision to close the court, while the defendants requested closure. Thus, only the interested and directly affected press could have provided arguments on the crucial First Amendment issues at stake.

(1968).[13] Justice Powell touched on this problem in his concurring opinion in Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979), stating that it is not sufficient for a trial court to decide whether to close a pre-trial proceeding in conformity with the standards prescribed by law.

> If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion. But this opportunity extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would

---

[13] See also Heller v. New York, 413 U.S. 483, 489 (1973) (noting the need for adversary proceedings at which all views concerning the propriety of restraints on First Amendment freedoms may be aired in order to ensure the necessary sensitivity to those freedoms); Wheeler v. United States, 640 F.2d 1116, 1121 (9th Cir. 1981) ("In almost every instance where First Amendment rights are to be restricted, notice and a hearing must be provided to the one whose rights are to be limited.").

> require substantial delays in trial and pretrial proceedings while notice was given to the public. Upon timely objection to the granting of the motion, it is incumbent upon the trial court to afford those present a reasonable opportunity to be heard on the question whether the defendant is likely to be deprived of a fair trial if the press and public are permitted to remain in attendance.

In the instant case, the trial court provided an opportunity for the press to argue against the exclusion orders only after the decision had been made, even though an opportunity for argument prior to the decision could easily have been provided by notice to the news reporters in attendance at the trial. An order affecting First Amendment rights

> must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protec-

> tion which the Amendment seeks to assure.

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 184 (1968) (footnote omitted).

Unlike Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), and other First Amendment cases arising in the state courts, the instant case affords this Court the opportunity to set forth guidelines for the consideration and issuance of orders affecting First Amendment rights in ongoing trials in the United States District Courts. Issuance of such guidelines under this Court's supervisory powers is particularly appropriate in this instance because the trial court's exclusion orders were based on rejection of the fundamental principles underlying jury trials: that the jury can be and must be trusted to follow the court's instruction in reaching its

verdict.[14] Absent reliance on the members

---

[14] E.g., Maxwell v. Bishop, 398 U.S. 262, 265 (1970) ("it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge ....'"), quoting Boulden v. Holman, 394 U.S. 478, 484 (1969). As explained in Paoli v. United States, 352 U.S. 232, 242 (1957):

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.

Thus, the Paoli court declared that the jury system is "[b]ased on faith that the jury will endeavor to follow the court's instructions ..." and that "'[o]ur theory of trial relies upon the ability of a jury to follow instructions.'" Id., quoting Opper v. United States, 348 U.S. 84, 95 (1954). See also United States v. Kampiles, 609 F.2d 1233, 1241 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980); United States v. Clardy, 540 F.2d 439 (9th Cir.), cert. denied, 429 U.S. 963 (1976); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975), further appeal, 550 F.2d 1133 (9th Cir. 1976).

of the jury to obey the instructions of the court, the jury system becomes a mockery.

When analyzed carefully, the trial court's orders closing the trial were based on four implicit findings, only one of which is arguably supported by the record: (1) the evidence to be presented at the closed portion of the trial would be both inadmissible and highly prejudicial; (2) the press would publish the evidence; (3) the jury would disobey the clear instructions of the trial court and read or listen to accounts of the evidence; and (4) the jury would again disregard its instructions and consider the evidence during its deliberations. Only the second of these assumptions has any direct support in the record. The trial court may have had information in camera concerning the first assumption, but this is only speculative on the information

available in the record. As to the third and fourth, however, the record is bare.[15]

Standard jury instructions are founded on the belief that jurors will obey the court and consider only the evidence properly before them. Thus, jurors are regularly instructed that they are to disregard everything they read or hear of the case outside the courtroom, e.g., E. Devitt & C. Blackmar, Federal

---

[15] The evidence before the trial court was, in fact, that its instructions forbidding the jury to read or listen to news reports of the trial were followed. While one juror was excused because he accidentally saw the headline of a news report, he reported what he had seen to the court in conformity with his oath. On another occasion, a juror came forward to report that she had heard the opening portion of a radio broadcast on the trial. Another juror explained that he read the newspaper only after having a family member clip out material relating to the trial. The Petitioner can cite no better proof in support of the premise that the jury system functions properly than the very evidence in this case.

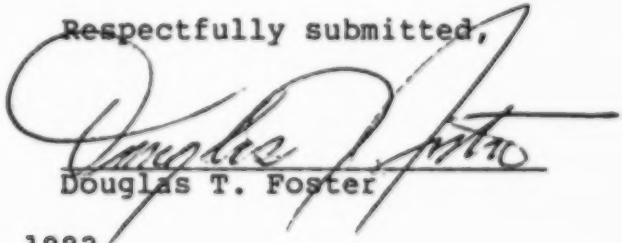
Jury Practice and Instructions §§ 10.03, 10.18, 11.11 (3d ed. 1977), that they may consider evidence only for a particular purpose, id. § 10.16, or that they may consider evidence only as to a particular defendant, id. § 10.17. Moreover, jurors are directed to disregard evidence that the court has ordered stricken. Id. § 11.11. In each instance, the jury is trusted to obey. Why, then, may the trial court assume without evidence not only that the jury will disobey the instruction forbidding it to read or listen to reports of the trial but also that the jury will again disobey its instructions and consider the forbidden information in reaching its verdict? No other circumstances exist in which infringement of First Amendment rights is permitted in the absence of a clear showing of compelling necessity. See Landmark Communications, Inc. v. Virginia, 435 U.S.

829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978); followed in Wheeler v. United States, 640 F.2d 1116, 1124 (9th Cir. 1981).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Douglas T. Foster

January 21, 1982.

# Appendix

THE SACRAMENTO BEE, published by McClatchy Newspapers, Petitioner,

v.

UNITED STATES DISTRICT COURT FOR the EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, Respondent

United States of America, William Dale Smith, Cheryl Bickford, James Cameron, Julius Fisherman, Norman Heifner, Andrew Pope, and Norman Truax, Real Parties in Interest.

No. 81-7255.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 15, 1981.

Decided Sept. 14, 1981.

(rehearing and rehearing en banc denied Nov. 6, 1981; as corrected on denial of rehearing.)

Petition for Writ of Mandamus to the United States District Court for the Eastern District of California.

Before WRIGHT, TRASK and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

The Sacramento Bee petitions for a

writ of mandamus directing the district court to issue no further orders excluding the press from any stage of a criminal trial. We conclude that the court's decision to close two brief hearings during the course of a two-month trial, after it had carefully considered alternatives and made findings in support of its closure decision, does not warrant issuance of the writ.

FACTS

The jury trial of seven of 22 persons indicted for trafficking in heroin began in Sacramento early in March 1981. Before trial, the defendants and the approaching trial were well publicized by the Bee.

In selecting a jury, the judge determined that the jurors had no prejudicial information. After selection, he

instructed the jury to avoid any media accounts of the trial.

At the start of the trial, the Bee published a story about the prior criminal activities of one defendant. Counsel for that accused, joined by other defense counsel, moved to sequester the jury. Having learned that one juror had seen but not read the story, the judge granted the motion.

It appeared, after a conference with the federal marshal, that sequestration would require two weeks to arrange, would require housing of the jurors away from their homes, constant attendance by marshals, and transportation by chartered bus with covered windows.

Defense counsel then decided the sequestration was not in the best interests of their clients. the earlier order was vacated, and the court directed

that government personnel, defense counsel, court personnel and the defendants refrain from communicating with the press about the trial.

The court admonished the jurors again to ignore media reports about the trial and directed them to have family members remove from newspapers any accounts of the trial.

After another Bee article about the trial on March 31, the court polled the jury. The juror who had seen the earlier story had read the later one and learned of inadmissible evidence about alleged organized crime connections of one defendant. Because of the prejudicial nature of that information, the court removed that juror.

On April 3, the court excused the jury, the public and the press from the courtroom for an evidentiary side bar

conference. The defendants and their families remained. Neither the press nor public objected and the court made no findings supporting closure.

On April 7, in open court without the jury, the court excluded the press, but allowed the public to remain while the government made an offer of proof.

When a Bee reporter asked for reasons to justify closure, the judge said that he feared that the jury might learn indirectly of inadmissible evidence. He noted that one juror already had been disqualified for that reason.

He explained that he had tried to balance the rights of the news media and the defendants by refusing to sequester the jury, and by refusing to exclude the press from each motion of the presence of the jury. He proposed that motions to exclude the press would be considered as

each problem arose, and said that he would grant such motions only "where there is a substantial possibility that evidence will not be put before the jury, [because] I don't want them to get it indirectly through the media." The reporter left the courtroom without objecting.

Counsel for the Bee appeared on April 8 and objected to exclusion of the press. The judge told him

> I am just telling you that I sat and thought through every alternative that I could find that I have been able to think of and they all don't meet the problem. Now I am anxious for you to supply me with an alternative that would work.

When counsel for the Bee suggested sequestration, the judge explained that was not feasible because it would mean

> in effect, putting the jury in prison, in effect putting them in a posture in which there will be deep resentment against

> the Court, and perhaps the government, and perhaps the defendants in this matter, having results which will be unpredictable but clearly serious.

He explained the mechanical complications of sequestration. He noted also that the jury was annoyed at the length of the trial, then in its eighth week, and said that sequestration would impose otherwise avoidable hardships because the jury had received no advance warning. One juror, a pregnant woman, might have asked to be excused had she known sequestration was possible.

When the court asked the parties again about sequestration, all said that they preferred exclusion of the media.

On April 10, a Bee attorney restated the newspaper's opposition to closure. The court again considered and rejected admonishing the jury because one juror had been excused after he learned of in-

admissible evidence, despite warnings to avoid news accounts of the trial.

It rejected the suggestion to clip the jurors' newspapers because the electronic media were broadcasting the newspaper's stories, the excused juror had learned of the prejudicial information despite taking that precaution, and it would be impractical to have marshals go to the jurors' homes to remove stories of the trial from all newspapers.

The Bee again suggested sequestration, but offered no new arguments or better suggestions.

The judge rejected considering evidentiary matters in side bar discussions because it would be "terribly inhibiting to whisper with the jury here when there are important things to be said which I want to think about and hear clearly."

When defense attorney suggested holding evidentiary hearings in chambers or in the jury room, Bee counsel challenged the right of the court to hold bench conferences on evidentiary questions.

Finally, the court said that closure caused only a temporary denial of information because reporters' transcripts would be available immediately at the end of the trial.

DISCUSSION

I

Jurisdiction

The Bee seeks a writ of mandamus under 28 U.S.C. § 1651 and has standing because it was excluded from a criminal trial and was inhibited from reporting news. See United States v. Gurney, 558 F.2d 1202, 1206 (5th Cir. 1977), cert.

denied, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). The case is not moot, although the trial is completed, because closure orders are likely to escape appellate review. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563, 100 S.Ct. 2814, 2820, 65 L.Ed.2d 973 (1980).

II

Standard of Review

Writs of mandate are issued only in extraordinary circumstances, guided by these factors, all of which need not be present

> '(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires, (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the district court's order is an oft-repeated error, or manifests a

> persistent disregard of the federal rules, and (5) the district court's order raises new and important problems, or issues of first impression.' (citations omitted)

Wheeler v. United States, 640 F.2d 1116, 1120 n.9 (9th Cir. 1981).

The first, second and fifth factors weigh heavily in favor of issuance of the writ because (1) the Bee is not a party to the criminal case and lacks standing to bring a direct appeal, see United States v. Sherman, 581 F.2d 1358, 1360 (9th Cir. 1978), (2) the court could continue to close hearings at criminal trials before an appeal could be heard, and (3) this case raises an important issue of first impression.

The fourth factor does not support issuance because two closure orders in an unusually well-publicized criminal trial do not qualify as oft-repeated error.

The key factor is whether the clo-

sure orders are so clearly erroneous as a matter of law that the Bee's right to issuance of the writ is clear and indisputable. See Allied Chemical Corp. v. Daiflon, Inc., ___ U.S. ___, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980).

III.

The Closure Orders

In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Supreme Court held that the press has a First Amendment right of access to a criminal trial.[1]

The plurality said that the court should consider alternatives to closure, and that "[a]bsent an overriding interest articulated in findings, the trial of a

---

[1] Seven justices reached this result. Justice Powell did not participate and Justice Rehnquist dissented.

criminal case must be open to the public." Id. at 581, 100 S.Ct. at 2830. It held that the trial court improperly closed the trial because the judge made no findings to support closure, made no inquiry into less intrusive alternatives, such as sequestration, and did not recognize the public's and the press's constitutional right to attend a trial. Id.

It cautioned that this right of access is not absolute and that courts may still impose reasonable restrictions to ensure a fair trial. Id. at 581 n.18, 100 S.Ct. at 2830 n.18. It did not, however, indicate how courts should balance these interests.

Richmond Newspapers followed a confusing decision in Gannett Co., Inc. v. De Pasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), which sustains closure of a pretrial suppression

hearing and concludes that the Sixth Amendment right to a public trial is personal to the defendant and may not be used to support a right of access by the press or public. Id. at 379-84, 99 S.Ct. at 2905-08. In five separate opinions, seven of the nine justices used balancing tests to determine whether the defendant's right to a fair trial took precedence over the rights of the press and public.[2]

Justice Stewart, in the plurality opinion, looked to these factors: (1) was objection made at the time of the closure? (2) did the public have a chance to object upon request? (3) did the court balance the pubic's First Amendment

---

[2] Chief Justice Burger voted to uphold the court's closure order on the basis that it restricted public access to a pretrial hearing rather than a hearing at trial. Justice Rehnquist alone believed that the press had no rights to balance.

rights against the defendant's Sixth Amendment rights? (4) was the denial of access based on a "reasonable probability of prejudice" to the defendants? and (5) was the denial absolute, or would a transcript be made available after the danger of prejudice passed? Id. at 392-93, 99 S.Ct. at 2911-12.

Justice Blackmun, dissenting, developed a balancing test permitting exclusion of the press from a pretrial hearing only if "strictly and inescapably necessary" to preserve the fairness of a criminal trial. Id. 440, 99 S.Ct. at 2936.

Justice Powell, the sole advocate of the press's First Amendment right of access, considered these factors relevant to closure decisions:

(A) Those present when the motion

for closure is made must have an opportunity to be heard.

(B) The defendant must "make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings."

(C) Those objecting to closure must show that reasonable alternatives are available and the court must consider whether they would preserve the fairness of trial without interfering substantially with the right of access.

(D) The exclusion must be no more extensive than required. Id. at 400-01, 99 S.Ct. at 2916-17.

These cases indicate clearly that the right of access is not absolute and must be balanced against the defendant's Sixth Amendment right to a fair trial. A court faced with a closure motion must give those present a chance to object,

consider less intrusive alternatives, articluate its reasons for closure in findings, determine that the defendant's right to a fair trial will be prejudiced by public access, and make the exclusion as narrow as possible.

Judge Karlton met those requirements. He allowed the press an opportunity to object to closure and held a hearing on the matter after the second exclusion. There being no objection to the first closure, a hearing was unnecessary.

He gave careful and adequate consideration to less intrusive alternatives, although he did not consider all possible ones, and made sufficient findings to support his rejection of them. He rejected further admonitions to the jury to avoid media accounts of the trial and having press accounts clipped because

one juror had already been tainted and removed despite those precautions.

He rejected sequestration because of the onerous burden it placed on jurors and on the court at that time in a trial already unduly protracted.[3] He eliminated side bar conferences because of the number of counsel and court personnel involved and because of the desire to avoid giving the jury the belief that secret information was being kept from it.

Although the court did not consider other alternatives, it informed Bee counsel repeatedly that no others were apparent and asked counsel for suggestions. Experienced counsel failed to offer anything new and simply disputed

---

[3] Sequestration might have been preferable if the trial had been shorter or if the need to exclude the press during the trial was known before the jury was impanelled.

the court's reasons why the rejected alternatives were inadequate.

We are puzzled, as we said to counsel at oral argument, that representatives of the press failed to suggest a logical and workable alternative to solve the court's dilemma. An easy solution would have been to acknowledge that immediate publication was unnecessary and that the Bee would await later developments in the trial until the material withheld from the jury might be printed without prejudice to any defendant and without inconveniencing the jury.

While we conclude that the court made the required inquiry, several other alternatives should normally be considered before closure. The court should seek first a voluntary agreement with the press about the timing and scope of coverage, with an agreed upon delay

being as brief as possible. (See generally ABA Project on Standards for Criminal Justice, Fair Trial and Free Press Standard 8-3.6 (1980) (citing similar rationale in ABA Standard 8-3.2).[4]

If the press does not cooperate, the court should consider a continuance, severance, change of venue, change of venire, intensive voir dire, and additional peremptory challenges, in addition to sequestration, admonishing instructions, clipping of newspapers, and side bar and in chamber hearings. The stage of trial at which the closure motion is

---

[4] This alternative, however, should not be confused with a gag order restraining the press from publishing information presented at a criminal trial. Gag orders are unlawful except under the most compelling circumstances. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

made will dictate which alternatives should be considered.

The record indicates that the court's conclusion that the defendants' right to a fair trial would be prejudiced by press access to the two evidentiary hearings was well-founded. Experience demonstrated that the Bee would publish inadmissible evidence that would come to the jurors' attention despite all precautions and that there was a substantial likelihood that evidence presented at the two closed hearings also would be inadmissible.

The court's first order excluding the public and the press from that evidentiary hearing but refusing to exclude them from all hearings held outside the presence of the jury, satisfies the requirement that the exclusion be as narrow as possible. There is sufficient

indication that the evidence was prejudicial and inadmissible and that the exclusion was temporary because the court agreed to release the transcript of the closed proceeding at the end of trial.

The second exclusion order, excluding the press but not the public, was drawn too narrowly because the press may have the same access to public trials as does the public. See Richmond Newspapers, 448 U.S. at 577 n.12, 100 S.Ct. at 2827 n.12; Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965). This error, taken in the context of a protracted trial in which the judge carefully balanced the First and Sixth Amendment rights, is insufficient to justify the issuance of the writ of mandate.

CONCLUSION

The district court's conscientious

consideration and balancing of the rights of defendants and the media satisfy the constitutional requirement that criminal trials be open to the press and public in the absence of "an overriding interest articulated in findings." Richmond Newspapers, 448 U.S. at 581, 100 S.Ct. at 2830. Although we conclude that preferable alternatives to closure exist, the judge's failure to consider them in the middle of a long and difficult criminal trial does not present such clear error as to warrant the grant of the extraordinary writ of mandamus.

The petition for the writ is denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BEFORE THE HONORABLE LAWRENCE K. KARLTON, Judge

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | CR.NO. S-80-118 |
| | ) | |
| v. | ) | |
| | ) | |
| WILLIAM DALE SMITH, SR.; SURAWAT ASSAWAMATIYANONT, aka WAT; CHERYL ANN BICKFORD, aka CHERYL ANN SMITH; ROCKEY BRANTLEY; DONALD STANFORD CAMERON; JAMES EDWARD CAMERON; PIROM CHONGCHAROEN, aka PETER ELLIOT DON COULSTON; JERAVAL DISYABUTRA aka VAL; JULIUS CHRIS FISHERMAN; NORMAN DALE HEIFNER; PAJON KRISSANAYUTH, aka JOE; MARION WAYNE O'DELL aka DIGGER O'DELL; LOUIS BURNHEART PATER; ANDREW EMITTE POPE; DAVID RALPH REMSING; CARLA IRENE SCHILIEN, aka CHRIS SCHILIEN, aka GRANDMA; WILLIAM CASH SCRIBNER; FREDDIE LEE STALKUP; GEORGE ALLEN THOMPSON, PETE THOMPSON; NORMAN | ) | |

CECIL TRUAX, and BOONYARIT)
VORAVITHAYA, aka BOON, )
)
Defendants. )
)

---oOo---

REPORTERS' DAILY TRANSCRIPT

---oOo---

EXCERPT OF
April 3, 1981

---oOo---

MR. HELLER: Your Honor, at one point, as I understand, either Mr. Louie was arrested or Mr. Wat was arrested, one of them, or both of them, and there was money seized and somebody said it was Billy's money, and I'm going to object to any attempt to try to introduce that on the Brouton question.

THE COURT: Billy?

MR. GIBBONS: Your Honor, the further showing would be this, and I was going to do this at the sidebar. We could have time now obviously because the

Court's interpretation of what the Court feels the duty is under Brouton and the other cases, but when Mr. Wat and Mr. Louie were arrested at 211 Teddy Street, this is South San Francisco, on the date of the controlled delivery, I believe forty-five or $48,000 was seized.

THE COURT: Let me interrupt you. That isn't a Brouton problem.

MR. HELLER: Wat was arrested.

MR. GIBBONS: Excuse me. Let me just make a showing. I was going to ask for a ruling on this.

THE COURT: Yes.

MR. GIBBONS: At the time of Mr. Louie's and Mr. Wat's arrest, they -- res gestae, both the money was Billy's from Sacramento.

THE COURT: Let's stop. It is five minutes to 11:00. I'm going to let the jury go and we will talk about it.

Ladies and gentlemen, we are going to take our -- you are going to take your recess at this time, twenty minutes. Please remember the admonition which the Court has heretofore given to you.

If there are any newspeople present, they are excluded at this time. Thank you, ladies and gentlemen.

(Whereupon the jury was excused from the courtroom.)

MR. GIBBONS: Your Honor, this witness has no --

THE COURT: No connection with it?

MR. GIBBONS: No.

THE COURT: Why don't you step down, and you can come back in twenty minutes, too, sir.

(Continued proceedings out of the presence of jury.)

THE COURT: All right. The record will reflect we are in open court; all

counsel and defendants are present; the jury is not.

MR. BYRON: Excuse me, your Honor, I hate to interrupt, but I know the Court ordered the news media out for a specific reason, however, there are other spectators in the courtroom who can confer with the press once this hearing is over with.

THE COURT: Do all the defendants desire that this hearing be closed?

MR. HELLER: Yes, except the immediate family of the defendants.

THE COURT: All persons are excluded.

(Whereupon all spectators except the immediate family of the defendants were excluded from the courtroom.)

---oOo---

REPORTERS' DAILY TRANSCRIPT

---oOo---

EXCERPT OF

April 7, 1981

---oOo---

Mr. GIBBONS: Well, I'm going to have him testify about it, that it was used, because I think it directly relates to exhibit -- I believe it's 145-A. It can relate to that, that Mr. Eldridge had a nickname for this defendant called "Phone" and that's where he had a list of all the money that he testified that he paid to Mr. Smith, and Mister --

THE COURT: How would that have --

MR. GIBBONS: Mr. Heller can say "Phone" with a "P", it's Penny Cooper.

THE COURT: I understand, but that's for the jury.

MR. GIBBONS: I think I'm entitled to --

THE COURT: How does that relate to the nickname "Phone"? The fact that he --

MR. HELLER: Uses pay phones?

THE COURT: No, no. That wire goes out.

MR. HELLER: Your Honor, using the Southern Pacific access code is evidence of possible wire fraud, an unrelated crime to the case.

THE COURT: Gee, I didn't know that.

MR. HELLER: It's a federal offense.

THE COURT: Evidence of other crimes performed allegedly or -- do we have any evidence that he used that WATS line in connection with this conspiracy? Is there any evidence of that, Mr. Gibbons?

MR. GIBBONS: This one access code from December of 1979 -- or '78 --

MR. HELLER: Your Honor.

MR. GIBBONS: '79 through --

MR. HELLER: I move to exclude -- to remove the reporter -- I mean, this is going to be printed in the newspaper, and ...

THE COURT: Do all defendants join in the motion?

(All defendants nod affirmatively.)

Does the government object?

MR. GIBBONS: I take no position.

THE COURT: You take no position.

All media are excluded. I'm sorry, sir.

UNIDENTIFIED PERSON: I would like to get a ruling on the reason for it.

THE COURT: Well, I will make it very explicit. The Court has been moved by the defendants to sequester the jury; the Court has been requested to do other terribly extreme things, the Court has declined to do that; the Court has been asked to exclude the press each and every

time there is an out-of-the-jury presence motion, the Court has refused to do that. The Court has told the defendants that it will consider on a motion-by-motion basis the exclusion of the media. We have already lost one juror who read an article concerning evidence which was not properly before the jury. I do not intend to take the chance again. Where there is substantial possibility that evidence will not be put before the jury, I don't want them to get it indirectly through the media.

Accordingly, at the request of all of the defendants, the media are excluded from this portion of this hearing only.

UNIDENTIFIED PERSON: Is that the media and the public?

THE COURT: The media.

UNIDENTIFIED PERSON: Just the media? Okay.

THE COURT: The record will reflect that colloquy was just had with a reporter for the Sacramento Bee.

Mister --

MR. HELLER: I'm sorry. Mr. Gibbons was in the middle --

THE COURT: Yes.

MR. GIBBONS: Within a three-month period of time, it was -- that account, which was not subscribed to at that time by anyone, it was a number, an in-house I.D. number was abused in excess of, I think, $10,000 within three months. The same access -- the same and common number --

THE COURT: Can we identify --

MR. GIBBONS: -- found in the possession of Mr. Wat, Mr. Fisherman, Mr. Smith and Miss Bickford.

---oOo---

REPORTERS' DAILY TRANSCRIPT

---oOo---

EXCERPT OF

WEDNESDAY, APRIL 8, 1981

---oOo---

THE COURT: All right. Counsel, state your name and appearance, sir.

MR. FOSTER: Yes, your Honor. Douglas T. Foster, legal counsel for McClatchy broadcasting and newspapers.

THE COURT: Your purpose in being here, sir, is?

MR. FOSTER: My purpose, your Honor, is to formally object -- I believe that's probably the appropriate note to make -- to the practice of the Court excluding a member or a reporter from the Sacramento Bee, specifically --

THE COURT: It's all media.

MR. FOSTER: All media. And not because you're allowing the public to re-

main, but excluding the media during certain proceedings that took place in the court, which I've had a brief description of what they are.

THE COURT: Let me make the record quite clear. Although I've communicated to you on the phone, I've indicated to counsel that I have done so, I want to make very clear to you exactly the scope of the Court's order and the procedure.

There have been motions to sequester the jury, which have been denied. There have been motions to exclude all media -- I don't know whether there's been a motion to exclude all media throughout the trial. I can't remember that. There has been a motion to exclude all media from proceedings in court where the jury is excluded. The Court has denied all of those motions. I have simply indicated that I will entertain on a proceeding-by-

proceeding basis, and that is exactly what the Court has done. I exercise the power only when I believe that it's a matter conceivably prejudicial to either the government or the defendants in the case, although, the government has never asked me -- Mr. Gibbons, am I correct, the government has never asked me to exclude the media during one of these proceedings yet?

MR. GIBBONS: We took no position, your Honor.

THE COURT: All right. In my judgment, there is matter which will be discussed, which may prejudice a defendant in the case if it appears in the newspapers and is read by one of your jurors.

Now, having set forth the scope of the order, you may proceed.

MR. FOSTER: First, let me say, we appreciate your Honor's sensitivity to

the subject. We're here to discuss the problem that we have, your Honor, is that we're in open Court here, and this is a public place. It's a place where the public and press have a right to be. It's a criminal proceeding.

Your Honor know, last term, the United States Supreme Court held that the press had a First Amendment right to be present during such proceedings, barring some very, very, extraordinary type of thing, which they did not describe, but which is clearly not present here.

THE COURT: Well, counsel, that is an assumption you ought not to make. For your own information, I will tell you that we have lost one juror, a juror that many defendants objected to having being relieved, because despite the Court's admonition that the jurors should have a member of the family go through the news-

paper, first, and clip out stories concerning this case, and then turn the newspaper over to them, the juror did not, and inadvertantly [sic] read a headline and a name, put two and two together, and interestingly enough, came up with four instead of five, but that's neither here nor there. It was material which, it was my judgment, the jury should not have received.

MR. FOSTER: I understand what happened, your Honor, and it's obviously regretful it happened. The point, though --

THE COURT: More than regrettable to some of these defendants; two feel their right to a fair trial has been prejudiced.

MR. FOSTER: Well, I can appreciate that, but, your Honor, to remedy that, we don't need to violate and trample upon

the First Amendment right of the press and the public.

Now, usually, it's voiced the other way, that the press have no rights greater than the public, but certainly the press has at least as much right as the public, which has not bee [sic] excluded. However, I think for purposes of this argument, we can assume that when you exclude the press, you're really also excluding the public, and I would quote for that authority, your Honor, from Richmond Newspapers versus Virginia, decided the last term. As I said, I think your Honor is well aware that was the case where it was held constitutionally err [sic] for the trial court to close a criminal trial without first having the defendant have the burden of coming forward and showing why his fair trial rights might be in jeopardy, and

further, not going through and showing why any one of those several alternatives to exclusion -- the sequestration you mentioned would not have recified the situation. So, in that case, that was a violation of the First Amendment.

Now, in the course of that opinion, they gave a very, what I think a very good description of the syntax of the connection between the press and the public, which I think is applicable here. And if you will bear with me I will just read it. I am quoting. It's a daily, your Honor, page 986, and 987 of 65 Lawyer's Edition Second 973 of the Richmond Newspapers, Inc. versus Virginia:

> "With the press, cinema and electronic media now supplying the representations or reality of the real live drama was available only in the courtroom, attendance at court is no longer a widespread pasttime,"

as it has been --

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public --"

THE COURT: Counsel, I must interrupt you. I am going to tell you I believe I have a greater sensitivity of the First Amendment of anybody in this courtroom save and except that reporter over there. I don't want latitudes. I don't want to be told how important the First Amendment is. I spend most of my life defending it. I want you to tell me what I can do that will prevent the distortion of this trial when the issue is the admissibility of the evidence and the problem is trying to keep the evidence from the jury until I make a

determination that it is proper evidence in light of the facts of this case which are that we have already lost one juror despite my having admonished the jury as to how to conduct itself.

Now let me tell you what sequestration means. Sequestration means each of these people will be required to reside in a hotel room instead of a home and have a marshal present with them at all hours, have somebody monitoring everything that they do.

I am told by a marshal that it will require that the bus that they are transported in to this courtroom will have the windows covered. I am told there will be significant delays in this trial amounting to several weeks while we get sufficient marshals for all of the jurors and alternates.

Now is sequestration a realistic

alternative in your view? You are being paid to tell me. I will tell you those are the facts. I want you to tell me that in your view as an officer of the court, because you have a duty, I want you to tell me if that is a realistic alternative.

MR. FOSTER: I am not saying there may not be other alternatives.

THE COURT: We are going to take them one at a time. Is that one a realistic alternative?

MR. FOSTER: It may not be.

THE COURT: Tell me the next?

MR. FOSTER: I haven't finished, your Honor.

THE COURT: All right.

MR. FOSTER: My answer was it may not be the most desirable alternative but it is better than trampling on the First Amendment rights.

THE COURT: Well, counsel, I will tell you you have gone a little bit further from the reality of the situation. There are two things that have to be said. One, the sole matter that the press is being excluded from is a very limited matter which is when evidence which may be improper is going to be discussed.

Now I have an alternative. I can do it at sidebar. It is your view the press has a right to come through the double door and stand at the sidebar conference?

MR. FOSTER: You mean your chambers?

THE COURT: The sidebar. It's right here.

MR. FOSTER: Right here? Not necessarily.

THE COURT: Thank you. Therefore, it appears there must be some orderly fashion in which this can be run which

will exclude the press. Something might happen in the trial --

MR. FOSTER: Well --

THE COURT: Just a minute, counsel.

-- consistent with the First Amendment in which the press would be excluded. So we begin with the understanding that there is a very limited order in which the Court may proceed without the press' presence to begin with.

Second of all, a daily is being created. That daily will be available to the press immediately upon the close of this trial. So you are not being excluded permanently, either.

Now it is in that context a delayed application of the First Amendment, a very serious matter. I don't say that it's something that we all ought to take joy in, but we all ought to appreciate what it is. A delay in the exercise of a

First Amendment right in a situation which court can proceed at sidebar without the press being present at all, and the reason that I chose not to do that is, it is terribly inhibiting to whisper with the jury here when there are important things to be said which I want to think about and hear clearly.

Now that is the context. In that context, is it your view that the First Amendment requires me to sequester the jury before I proceed to exclude the press from the courtroom under these very limited circumstances?

MR. FOSTER: I think maybe your Honor is assuming that you have to go too far. What you are telling me is you have exclude the press in order to please the jury over here, and that stated seems to answer it. There certainly must be other things to do.

Let's clip the paper they get.

THE COURT: No, sir, that is just what happened in the case. Now let's talk about the alternatives.

The first alternative is sequestration. Under these circumstances, given the competing values, given my, in effect, putting the jury in prison, in effect putting them in a posture in which there will be deep resentment against the Court, and perhaps the government, and perhaps the defendants in this matter, having results which will be unpredictable but clearly serious. I put it to you again, those results vis-a-vis the limited right, do you believe the First Amendment requires me to lock this jury up?

MR. FOSTER: All I can answer to that, your Honor, is to say the United

States Supreme Court listed that as an alternative in many cases.

THE COURT: I quite agree with you. I'm asking in this case, with these circumstances and the limited nature of this court, is that your position?

MR. FOSTER: If that is the only available remedy, yes. If that's the only available remedy.

THE COURT: All right. Tell me what other remedies you propose?

MR. FOSTER: We are talking about a case where apparently the article was in the newspaper; the juror wasn't supposed to read. Maybe there's some way the newspaper gets clipped before it gets to the family.

THE COURT: I have already asked the jury to do that, and with unfortunate results.

Tell me, what am I supposed to do?

Send a marshal to the home of each juror and have him clip the paper?

MR. FOSTER: I don't know, but there must be some sense of responsibility of this jury that can be enforced. I can't understand why your Honor's orders don't get obeyed.

THE COURT: Mr. Foster, I will tell you, it didn't. That's what's the matter. I don't have to speculate. I don't have to guess. It is done. It is over. You're faced with a real world record, not an abstraction in front of the Supreme Court. A real world record.

Things have happened. Tell me how to accomplish that without excluding the press?

MR. FOSTER: Everything I am suggesting you're telling me doesn't work. I don't know what to tell you, your Honor.

THE COURT: That's my problem.

MR. FOSTER: I haven't been here. I don't have anywhere near the knowledge -- I hardly know anything about the case.

THE COURT: You see, Mr. Foster, let me tell you, that's what all the lawyers come in and tell me, "Gee, Judge, that's not my case. My partner can't be here."

MR. FOSTER: I'm not saying --

THE COURT: You're here representing your client. If you say you're unprepared to proceed and you want to gather the record, I will be happy to reset.

MR. FOSTER: I think we are prepared here on the principle we are here about.

THE COURT: Tell me what we can do? What are the alternatives?

MR. FOSTER: I listed two. Cut the subscription if you have to. That's the least drastic. If that is the least drastic than sequestration, then that's

the one to do. That has been done in my experience.

THE COURT: You know, let me tell you something about all that. We have another problem. As a very practical matter, would you not have the electronic media here? The electronic media are obviously working off of your wire stories. Even clipping the newspaper -- or if I had the power to forbid people to exercise their right to have a newspaper --

MR. FOSTER: There's a problem with that, you're right.

THE COURT: That wouldn't solve this problem because it would be in your newspaper story and picked up by the electronic media and we are right back in the same problem.

I want you to tell me what other

alternatives you have? You see, I think you have the idea that I did.

MR. FOSTER: No, I don't, your Honor.

THE COURT: I am just telling you that I sat and thought through every alternative that I could find that I have been able to think of and they all don't meet the problem.

Now I am anxious for you to supply me with an alternative that would work.

My clerk tells me I am being hostile. I apologize.

MR. FOSTER: I don't know who is telling you that but we know your sense of the First Amendment and --

THE COURT: Just tell me what it is I can do, Mr. Foster?

MR. FOSTER: I said two things, but they don't work, you tell me. I guess I

am back to sequestration. Emphatic instruction to the jury.

THE COURT: At this time the defendants move for sequestration?

MR. HELLER: Yes, your Honor.

THE COURT: I ask you now, as compared to the exclusion of the media or sequestration of the jury, what do the defendants desire?

MR. HELLER: I know on behalf of my client it is not even close. I think we prefer the limited sequestration of the media from the courtroom.

THE COURT: What is that, sir?

MR. HELLER: The reason that the jury -- I believe from my opinion from observing them over the past week -- is a little bit annoyed, and the fact that we promised them a six-week trial and we are in the eighth week. We have two, three more weeks to go, and we have had an

awful lot of delays caused by different things, none of their own doing.

And I think it would be a terrible hardship to lock the jury up in this kind of case at this point.

THE COURT: Is there any defendant who takes a different position?

MR. GIBBONS: Your Honor, I would like to speak --

THE COURT: I am about to.

MR. GIBBONS: -- and join in that position. As a matter of fact, I would ask this Court comments with regard to that juror -- we too pass. As a matter of fact, I believe we had six or seven challenges. We did want that juror on just as much as the defense.

THE COURT: That's right.

MR. GIBBONS: Frankly, I think the Court has been totally candid and very reflective of the First Amendment rights

and thoroughly attempted to explore the two competing interests, and there is one that has to be maintained, that being a fair trial before a jury.

THE COURT: Yes.

MR. FOSTER: Your Honor, could I respond to that?

THE COURT: You certainly may in just a moment.

Mr. Heller?

MR. HELLER: Your Honor, just for the record, two of the most damaging news articles had to be taken out of the presence of the jury. One mentioned the name of a known Mafia hit man and the other was the mention of a person termed a hit man.

THE COURT: I am painfully aware of that.

Mr. Winters, you seem to rise for some purpose?

MR. WINTERS: Yes, your Honor. I want to put on the record without raising our previous objections to failure to sequester, which was requested and denied at the time and we later had the problem.

I would like to state on behalf of Mr. Fisherman that we feel the Court's ruling excluding the press is the correct ruling as to evidentiary matters as opposed to those matters which are to go before the jury because certainly I don't believe that the Supreme Court has held that the press is entitled to all evidentiary hearings. I think the Court has a right to control those hearings and determine what is the valid evidence against the defendant and then the press has the right to hear it.

I don't think the press has standing to come in and control evidentiary hearings. I think your Honor's rule is cor-

rect and should continue. The press should be excluded.

THE COURT: Mr. Foster, as youi [sic] know, it is not accidental that counsel are uniform in this view.

MR. FOSTER: Oh, I'm sure of that. We have been through this many times.

THE COURT: I understand. But it is not an accident. In this case it is not speculative. Now that's the reality. Tell me what to do. Tell me what to do realistically without waving a flag? I'll wave it for you twice as hard. Just tell me what to do.

MR. FOSTER: I believe your Honor is in a much better position than I am to do that. All I can say is as long as the proceedings are had in an open courtroom, the press has a right to be there and that's about all I can assert.

THE COURT: Well, you know, I wish I had an alternative that was realistic.

MR. FOSTER: So do I.

THE COURT: That worked and would ensure a fair trial. I do not.

I will continue the practice that I have adopted. I will assure you for whatever it is worth that the motion will not automatically be granted. It will be granted only when I believe that we are going to have an occasion to discussion matters of admissibility of evidence; the knowledge of which to the jury is premature because I don't know whether it is admissible or not. I can say no more.

I will deny your motion to modify the practice. As I say, I don't know what else I can say.

We will stand recess, folks.

MR. FOSTER: Thank you, your Honor.

---oOo---

REPORTERS' DAILY TRANSCRIPT

---oOo---

EXCERPT OF

APRIL 10, 1981

---oOo---

THE COURT: .... The Court will recognize Mr. Burroughs on behalf of the McClatchy Newspaper.

The Court will also note Mr. Shubb is appearing on behalf of the United States at these proceedings.

MR. BURROUGHS: Thank you, your Honor. I wish to express our appreciation to Your Honor putting it over this morning so we could make a brief argument with respect to our [sic] decision, and I do advise the Court that it will be brief; ten to fifteen minutes, no longer, concerning our position.

We are concerned really with only one issue and one event which occurred

during the course of this trial, and that has been the determination of the Court to exclude the press and the public during hearings that are held outside the presence of the jury involving potentially inflammatory, prejudicial testimony which might be inadmissible.

If I understand the Court's concern correctly, it was a fact if the press were present the testimony is inadmissible and then it is published in the news media, that the jurors may inadvertently or advertently view it and as a consequence be prejudiced.

....

[W]e anticipate a reoccurrence of this type of thing; and insofar as McClatchy Newspaper is concerned, we consider it a serious departure from the normal method of dealing with this problem.

I point out that the traditional way, or perhaps I first ought to preface with the fact I believe there is no question but that the Court accepts the fact that the public is entitled to be present at a criminal trial as set forth in the last term of Richmond v. Virginia case.

THE COURT: No question.

MR. BURROUGHS: That the constitutional right has to be balanced with the Fifth Amendment right as a fair trial to the defendant and, of course, that obviously creates a problem that we were confronted with several days ago.

Our position is that the traditional method dealing with that problem is adequate, and by a traditional method I refer to admonishing a jury. I say that because that method, the method of the Court advising the jury what to do and what not to do and directing the jury,

commanding a jury, is at the very heart of our system. It permeates the entire proceeding.

The fact that the system is based upon the principle that the jury is going to follow the instructions of the Court. At the very outset in the determination whether a juror is acceptable depends on the response to questions presented by the Court. And throughout the course of the trial, again, this principle is reinforced. They are told not to visit the scene, and again it's assumed they will not visit the scene. They are told not to talk to witnesses, and again it is assumed they will not talk to witnesses. They are told not to discuss the testimony presented at trial with other people and, again, it is assumed they do not do that. They are advised to disregard on occasion comments

made by attorneys during the course of trial. They are told to disregard certain arguments during the closing phases of the trial. They are told to apply -- or they are told to disregard certain testimony, as a matter of fact, that has been presented and to, in effect, erase from their mind in making a determination and it is assumed that they do that.

They are told how to apply the facts to the law that's presented to them by the Court. It is anticipated they follow the jury instructions that are given to them. The entire system from the beginning to the end is based upon the fact that the jury will follow the instructions given by the Court. This is precisely why the solution was selected admonishing a jury not to review or read or

see, observe or listen to media comments relative to the trial.

But suggesting that that will not work I do not think is well-founded. No contention is being made that it is a fail-safe method.

As has been evidenced in this case, the Court has determined on one occasion that this very problem surfaced and that was the reason for making the decision to exclude the press and public during the part of this proceeding. The fact that it is not fail-safe does not mean that the system that has to be used when balancing these rights -- and I think in fact it is the approach that has to be used.

The alternative presents another problem insofar as the media is concerned. Basically what's being done is an imposition of a prior restraint.

Now, I am aware, of course, prior restraints are regularly placed on periodicals, magazines, newspapers, and even prior restraints that have been documented numerous times in newspapers pertaining to publication documents. Really what is involved here and what the Court is doing is imposing a prior restraint. What the Court is saying at this hearing is, there may be evidence which is prejudicial and inflammatory and inadmissible, and that the newspaper may publish that information and that a jury may read about that information and that information may prejudice that juror in some way. And it is based upon all of these contingencies, these possibilities that these events might occur that the Court determines that the press and public should be excluded. In effect, their First Amendment rights should

simply be erased based upon this possibility.

I think that the solution that has been generally applied in these instances is appropriate.

For example, if the Court determines that because of the length of the case and the notariety [sic] of the case, that it cannot reasonably expect the jurors can totally avoid any form of communication relative to the case outside of the courtroom, then the jury is sequestered. That is a solution. A very onerous solution. I recognize it; the Court certainly recognizes it. The Court chose not to impose that in this situation, and I suggest -- but as opposed to simply eliminating the press and the public's First Amendment right, which is clearly granted to them in Richmond versus Virginia, the alternative is to impose

upon the jury; that is, to sequester the jury so this type of thing -- so the possibility of their being contaminated could not happen.

....

In terms of alternatives available to the Court, I would suggest that, first, the admonition be applied, which I think based upon what I know of this matter, it would certainly be adequate in this case.

Secondly, if not, the jury should be sequestered. The last option available to the Court, I would suggest, is to remove the press and public from this courtroom; to simply eliminate the First Amendment right. That's not a balancing act. That is chopping off everyone's right and superimposing another right.

Lastly, I would comment on an issue that I believe surfaced at some point

during this proceeding, and suggestion that the transcript ultimately will be available and, therefore, it was a matter of delaying, in effect, a constitutional right. I would suggest initially that I am not aware of that remedy being a part of the constitutional right to assemble and the right of the press being present at a trial. But beyond that I would like in closing to read simply five lines from Justice Brandon's [sic] concurring opinion in the Richmond case, and he is referring to subsequent availability of transcript in criminal matters.

He said, "In advancing these purposes, the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'code' [sic] record is a very imper-

fect reproduction of the events that transpire in the courtroom."

And I sincerely believe that to be the case. There simply is no substitute for observing the proceedings. I am certainly not going to bore the Court with the reasons why the press and public should be here. I'm sure the Court is more familiar with those reasons than I am.

Lastly, or in conclusion, I would say that our concern -- the concern of the McClatchy Newspaper is perhaps not so much what had in fact occurred, the concern is that this is a procedure or a method of dealing with this problem that is going to be utilized in this trial again and perhaps other trials. We feel it a significant abridgement of the press and the public's right to be present during these criminal trials. It is in

that sense that I appear here this morning to urge the Court with regard to this specific type of problem in the future in this case and perhaps in the future generally that the Court adopted the position of the newspaper with respect to the method of dealing with this problem.

THE COURT: Thank you, Mr. Burroughs.

MR. BURROUGHS: Thank you.

THE COURT: Mr. Shubb, do you desire to speak to the matter?

MR. SHUBB: Your Honor, it is my position that the news media have a right to be present at this trial. This is the eyes and ears of the public. That right should not be abridged without first carefully weighing all of the conflicting interest of the parties including the right of the public to be informed of what goes on in this courtroom. I would

hope that the Court does not again feel that it is necessary to exclude the media from this trial, but if such a situation does occur again, I would be in full accord with the procedure of allowing the media through its authorized legal representative to be heard and to present any alternative that they feel would be appropriate and hopefully to arrive at some alternative solution.

THE COURT: Thank you, sir.

Mr. Heller, do you desire to speak to the matter?

MR. HELLER: Just limited, your Honor.

I too agree that the public has the right to be present, that the press has the right to be present and report whether it be accurately or inaccurately of the events that occur in this court-room ....

My concern is that there has to be some type of balancing between defendants' rights to a fair trial and the right of the press to access to every portion of the proceeding of a criminal trial. As we observed in this case, by the newspaper reports of matters that were taken out of the presence of the jury which would have a very, very devastating effect as to certain defendants if the jury was made aware of it. Once you ring the bell it is very hard to instruct not to consider it. It's like saying you're standing on a corner and it is not a white elephant. It's something humanly impossible to do. I don't think they have an absolute right to be present at bench conferences everytime the Court has a matter that we approach the bench on. I don't think the press should be traipsing up to the bench. What we are

doing is just facilitating and making it more convenient to the Court and counsel to have appropriate colloquy over what I consider significant legal issues, and I think that if necessary we should do it in your Honor's chambers or in the jury deliberation room, but I think if those issues once again arise, hopefully it won't, if it does I would make the same request in the interest of my client's right to a fair trial.

Again, I am a very firm believer and insist that the First Amendment might be similar to the late Justice Black as to the scope of the First Amendment.

But I think when you balance a defendant's right to a fair trial, especially in a case like this where my client faces imprisonment for the rest of his natural life without the possibility of parole, the stakes are so high that I

think a slight inconvenience has to give way to something more substantial.

Thank you.

THE COURT: Mr. Tedmon, do you desire to speak to the matter, sir?

MR. TEDMON: Very shortly, your Honor. And it is an easy thing for a person who represents the client in the courtroom to speak in glowing terms about the need of that client to have their rights protected. Certainly I think any defense lawyer speaks very loudly about that.

However, the Court doesn't represent any client. The Court has to balance everybody's interest, and that's the dilemma for the Court and that's also an attack on the Court.

Probably with the defense attack it is more than anybody.

THE COURT: Not these days.

MR. TEDMON: I think, your Honor, the actions taken by the Court in this particular case and as they relate to my client were taken, in my view, in the best interest to protect everybody, and I would concur in the Court's original decision as it was made even though it may have slightly impededed [sic] the press. I think it served a greater purpose to protect my client.

Thank you.

THE COURT: Mr. Dratman, do you desire to speak to the matter?

MR. DRATMAN: No, your Honor. I will submit it on the basis of the comments made by Mr. Heller and Mr. Tedmon.

THE COURT: Mr. Byron, do you desire to speak to the matter?

Mr. Winters, you are going to speak for Mr. Fisherman on this matter?

MR. WINTERS: Yes, your Honor.

THE COURT: You may come forward.

MR. WINTERS: Your Honor, I would like the record to reflect that it is not the defendants who are asking that these hearings be closed. I don't want that impression. The defendants are asking that the hearing be closed but I don't want the impression to be left with the public that they have something to hide or that there is something they are trying to keep away from the public.

We ask that it be closed on behalf of the defendants because society has an interest in seeing these defendants have a fair trial, and I feel the Court is faced with an extraordinary situation. It was an evidentiary matter and the Court's ruling was correct in upholding society's interest in protecting the fundamental rights of these defendants to

a fair trial. And in that situation the press may have -- their rights may have been impinged upon, but the Court had to do what it had to do in an unusual situation, and I think it ruled correctly. I think if we are to have a society of laws that does work that we have to look out for the rights of the individual despite what the public may think it needs on a temporary or expeditious basis at that time.

Thank you.

THE COURT: Mr. Hodge, do you desire to speak to the matter?

MR. HODGE: No. I concur with Mr. Heller and Mr. Tedmon.

MR. ZIMMER: I have a brief comment, your Honor.

I just want to point out that the press can create a problem in a case like this as in one case it did in the Court's

Exhibit No. 10, which was an article that presumably was talking about Kenneth Wells, but actually discussed my client in very disparaging terms. I don't think a juror would have recognized that it was about somebody in this case and how disparaging it was to get into the article.

The second part of it is that the judge's instruction to have some member of the family screen it would not have appeared to work in that particular case since if the jury is not discussing what is going on in the trial, they don't know the names of the co-defendants. So how would somebody reading that, coming upon Pope's name, know it was supposed -- they were supposed to strike it because it doesn't refer to the trial by the name that the public might know this trial by.

That's all I have.

THE COURT: Mr. Fong, do you desire to comment?

MR. FONG: A discussion in one of the articles affected my client. I don't think I have any quarrel with Mr. Burrough's position, his observation that one of the fundamental requirements in a system of jury trials is that an assumption is that an assumption is that jury would follow the Court's instruction.

However, it still is an assumption, and unless, or by the necessary one, and I think where events occur which indicate that that is an assumption, it may not be valid in certain instances, then I think the Court not only has a right but a duty to correct it and to ensure that the rights of the defendants to a fair trial are protected.

THE COURT: Mr. Burroughs, do you desire to close, sir? Is there anything

that you want to say in light of what has just been said?

MR. BURROUGHS: Just two comments, your Honor.

The first is the reference that was made also before, I think to this question about bench conferences.

Frankly, I am not familiar with any ruling -- Court ruling which would suggest that the trial itself can be chopped up, bifurcated, or cut into little pieces for purposes as to what constitutes a criminal trial and what doesn't. Richmond grants the right to the press and public to be present during the trial. Bench conferences may occur and it may be for the convenience of the Court, among other things, and those would not be subject to or heard by the press or public. But generally the events that occurred at the bench

conference are not the most substantial events that occur during the course of a trial and if it is a question of a hearing as to the inadmissibility of the evidence, it also involves arguments made on the record in a voice that can be heard by people, the public in attendance, as it should be, and, of course, the witness present.

But I am opposed to the presumption that certain parts of the criminal trial are closed to the press and the public. I don't know of any support for that position.

Secondly, while I agree with Mr. Shubb and I am grateful to the Court for having advised us yesterday and advised me that they would permit an attorney to be present for the news media during the remainder of the proceedings should this event arise to present the objection, I

would point out to the Court this is another practical consequence of this type of thing. I think we are in serious trouble if we have -- if the news media has to hire an attorney to follow around the reporter at every criminal trial so he immediately is ready to present his case. I think it is a logical consequence of this kind of approach to dealing with the problem.

Thank you, your Honor.

THE COURT: There is perhaps no more difficult problem which faces society today than the intent to provide a fair trial in a context in which other competing interests may appear to impinge upon that right to a fair trial. And the so-called conflict between a fair trial and free speech is a variant of that problem. It is perfectly true that the entire system is based upon the jury's

obedience to the Court's instructions. That does not mean that we ignore the fact that the jury may not be able to do so and do reasonable things in an effort to ease the jury's job.

Indeed the very reason for arguments about the admissibility of evidence is to not put the jury in the position of having to do a mental act which is, as we all know, next to impossible. It is simply unrealistic to say that the Court's -- no, it is not unrealistic. It is not only in accord with nature but it isn't in accord with the law that we do not aid the jury in its difficult task.

The argument that suggests this is a prior restraint presumes the reverse. It presumes the right to both here and the public. I can say that evidentiary matters appear to me to be matters which may be taken at benchside and when so

done, do not become part of the public domain, at least at the time they are going on and it just seems to me that what we are doing is no more than a benchside conference in a more convenient way.

The newspapers rely upon Richmond, as they should, and overlooking again that matter which recognizes that preliminary matters may be under appropriate circumstances, be closed. Once the recognition of that right exists, then the question of prior restraint simply does not arise.

The only question is this one characteristic or the other. It appears to me the evidentiary questions may be closely analogous to a preliminary hearing than they are to a trial.

Having said as much, I don't want to be misunderstood and suggesting that the

public's business may be done in private. This trial, like every trial, is the public's business. It is the litigation between the government and the defendants, but it exists solely because we are a free society. And it is clear to me that the press has an important duty. That duty is and indeed ought to be in some ways antagonistic to the fair trial procedure because the fair trial procedure involves the question of ascertainment of admissible evidence.

Frankly, it is the press job to seek out, and sometimes correctly and sometimes incorrectly they assess inadmissible evidence; but it is not this Court's power to make judgment about how the press does its job but that antagonistic function of the press is not to just take the hands away from the government, and in this function I am the

government for this purpose, and just print them does represent an antagonistic function in terms of the Court's efforts to ensure only properly admitted evidence is before the jury.

I think what the Court has tried to do for better or worse is to find the least entusive [sic] way of serving the two purposes. I have denied motions which would have excluded the press generally. I have denied motions which would have excluded the press from every evidentiary hearing. I have indicated that I will decide the question on a case-by-case basis in an effort to determine how inflammatory the issue is and rule accordingly.

It is a suggestion of the McClatchy Newspaper that the problem is speculative. There is nothing speculative about it. We have the experience. The experi-

ence has been verified. A juror trying to obey the Court's order nonetheless was tainted in the fashion which required me to exclude it, and as Mr. Gibbons and defendants pointed out with some vigor yesterday, the defendants, some of the defendants urgently wanted that particular juror, and the government, as Mr. Gibbons pointed out, had passed six or seven challenges because they wanted him as well. It is not speculative.

Moreover, the question of having a member of the family go through the newspaper and clip it out which is what I have directed jurors to do, would not totally solve this problem.

As I pointed out to you already in our informal conference, the electronic media is not present. It is picking up McClatchy News stories and thus we cannot solve the problem that way.

My own view that sequestration of the jury is absolutely unacceptable in this case. It will result in a jury that would be properly distressed and it is reasonable to believe that that distress will in some unforeseen fashion affect their ability to focus solely on the issue.

I certainly recognize the code [sic] record is not being the same as being present. I take some solice in the fact this is merely delay rather than total exclusion of the public's opportunity to learn of the public's business, but that was the sole basis for my ruling.

I would turn around right now because it seems to me quite clearly an inadequate response, but it is some solice.

I have asked the press and I put it to Mr. Foster when he was here and I put it to you again, sir, tell me the

alternative. The alternative as you have suggested as best I can tell are threefold.

One, admonish to the jury we have not speculated but in fact had a demonstration that it is inadequate.

Two is the clipped of the newspapers. For the reasons I have explained, that is inadequate.

Three is sequestration. It is my view that will destroy the opportunity of the government and the defendants to have a fair trial in this case. I do not believe that is a viable alternative.

I thus come to the same problem that I have had all along. I know of no alternative but to proceed in the fashion that I have proceeded hopefully acting with sensitivity to the competing interest recognizing that it is a terribly serious matter when the press is

excluded for ven [sic] a moment from a public trial. But that there may well be circumstances which require it and that when they arise I will proceed in the fashion that I have perceived. I have indicated to Mr. Burroughs yesterday, and I will tell counsel this, and I don't expect it to be terribly surprising to them, there is case law which suggests that the public has no standing in a particular trial to raise objections. I will, and I do -- they may not take the opportunity -- but I will grant amicus status to Mr. Burroughs or any attorney for McClatchy Newspapers who they desire to aid me in making judgments whether or not this is an issue of such sensitivity. This is a -- this case is complicated enough. I hardly need another lawyer, but I think that there is no other lawyer in the courtroom who will do that

service, although to be honest with you, I think that is a service I have been performing in this trial, but I would be perfectly happy to have -- that isn't candid enough -- I would be more than willing to have yet one more lawyer to -- put before me, to keep track of the legal problems.

Mr. Burroughs, it is up to your client whether he wishes to exercise that privilege or not. The Court will maintain its ruling.

* * * * *

CERTIFICATE OF SERVICE

I, Douglas T. Foster, a member of the Bar of the Supreme Court of the United States and counsel of record for The Sacramento Bee, petitioner herein, hereby certify that on January 29, 1982, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, namely,

The Honorable Lawrence K. Karlton
United States District Judge for the
Eastern District of California
650 Capitol Mall
Sacramento, CA 95814

The United States Attorney for the
Eastern District of California
Room 3305
Sacramento, CA 95814
Attn: Ken Peterson, Chief
Criminal Division

The Solicitor General
Department of Justice
Washington, D.C. 20530

In addition, I served the foregoing persons with three copies of the Notice of Parties Without Interest in the Petition.

I also served one copy of the Petition for Writ of Certiorari and of the Notice of Parties Without Interest in the Petition on the following persons:

E. Richard Walker
Federal Defender
1125 Firehouse Alley
Sacramento, CA 95814

Donald H. Heller, Esq.
Herman B. Smith, Esq.
(counsel for William Dale Smith)
1451 River Park Drive, Suite 230
Sacramento, CA 95815

Clifford E. Tedmon, Esq.
(counsel for Cheryl Bickford)
2717 Cottage Way, Suite 20
Sacramento, CA 95825

Leroy Y. Fong, Esq.
(counsel for Norman Truax)
926 J Building, Suite 1116
Sacramento, CA 95814

Ernest F. Winters, Esq.
Harvey Byron, Esq.
(counsel for Julius Fisherman)
901 H Street, Suite 301
Sacramento, CA 95814

David W. Dratmen, Esq.
(counsel for James Cameron)
900 G Street, Suite 7
Sacramento, CA 95814

Robert E. Hodge, Esq.
(counsel for Norman Heifner)
1023 "H" Street
Sacramento, CA 95814

Werner Zimmer, Esq.
(counsel for Andrew Pope)
3400 Watt Ave., Suite 200
Sacramento, CA 95821

Service was effected by depositing such copies in the United States Post Office, Sacramento, California, with first class postage prepaid, properly addressed to the post office addresses noted above.

All parties required to be served have been served.

Dated: January 29, 1982.

Douglas T. Foster
Legal Counsel, McClatchy Newspapers
P. O. Box 15779
Sacramento, CA 95813
(916) 446-9211

# Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1563

# In the Supreme Court of the United States

OCTOBER TERM, 1981

THE SACRAMENTO BEE, PETITIONER

*v.*

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

GLORIA C. PHARES
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether the district court erred in excluding newspaper reporters from two brief evidentiary conferences held during an eight-week criminal trial, when inadmissible evidence highly prejudicial to the defendants was discussed at the conferences and the court determined that there was no practicable alternative to excluding the reporters.

2. Whether the district court erred in conducting a hearing on the exclusion of the reporters after, instead of before, the conferences, when petitioner did not request a hearing until after the conferences.

## TABLE OF CONTENTS


Page

Opinion below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 5

Conclusion ..... 11


## TABLE OF AUTHORITIES

Cases:


*Central South Carolina Chapter* v. *Martin*, 556 F. 2d 706, cert. denied, 434 U.S. 1022 .... 10

*Cox* v. *New Hampshire*, 312 U.S. 569 ..... 7

*Gannett Co.* v. *DePasquale*, 443 U.S. 368 ..... 7, 8, 9

*Grayned* v. *City of Rockford*, 408 U.S. 104 ..... 7

*Heffron* v. *International Society for Krishna Consciousness, Inc.*, No. 80-795 (June 22, 1981) ..... 7

*Mathews* v. *Eldridge*, 424 U.S. 319 ..... 10

*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 ..... 6-7

*United States* v. *Criden*, Nos. 80-2309 and 80-2482 (Mar. 26, 1982) ..... 9

*United States* v. *Gurney*, 558 F. 2d 1202, cert. denied, 435 U.S. 968 ..... 10

Page

Constitution:

United States Constitution:

First Amendment ..... 4, 5, 6, 7, 8

Sixth Amendment ..... 5, 6

# In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1563

THE SACRAMENTO BEE, PETITIONER

*v.*

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 656 F. 2d 477.

### JURISDICTION

The judgment of the court of appeals was entered on September 14, 1981. A petition for rehearing was denied on November 6, 1981. The petition for a writ of certiorari was filed on January 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Petitioner, a newspaper, challenges the exclusion of its reporter from a conference held during an eight-week jury trial of seven persons indicted for trafficking in heroin (Pet. App. 2).

1. Before the trial began in March 1981, petitioner heavily publicized the approaching trial and the defendants. At the start of the trial, petitioner published an account of the prior criminal activities of one of the defendants. All the defendants then moved to sequester the jury. The district court—which had instructed the jury to avoid all press accounts of the trial—found that one juror had seen but not read petitioner's story and granted the motions (Pet. App. 2-3).

The United States Marshal reported, however, that it would take two weeks to arrange sequestration, and that the jurors would have to be housed away from their homes, constantly attended by marshals, and transported by a chartered bus with covered windows (Pet. App. 3, 42). When the defendants learned of these difficulties and hardships, they reconsidered and decided that it was not in their interest to have the jury sequestered. The court accordingly vacated the sequestration order and directed all government personnel, court personnel, defense counsel, and defendants to refrain from communicating with the press about the trial. The court again admonished the jurors to ignore press reports of the trial and directed them to have family members clip accounts of the trial from the newspaper (*id.* at 3-4).

On March 31, 1981, petitioner published an article about the trial that revealed inadmissible evidence about the alleged organized crime connections of one defendant. The district judge questioned the jury, found that one juror had inadvertently seen this article,[1] and removed that juror from the panel (Pet. App. 4, 37-38).

---

[1] Apparently the person responsible for clipping the juror's newspaper did not know enough about the case to connect the article with it (Pet. App. 38, 78).

On April 3, the court ordered the jury, public and press to leave the courtroom while it conducted an evidentiary conference with counsel; the defendants and their families remained. No one in the courtroom objected (Pet. App. 4-5, 25-28). On April 7, the court excluded petitioner's reporter, but not the public, while the government made an offer of proof (*id.* at 5). When the reporter asked the reasons for his exclusion, the district judge explained that he had already been forced to dismiss one juror because of prejudicial publicity and did not want to create the risk that others would have to be excused. The judge also stated that he believed sequestration of the jury would be too extreme a measure. Finally, the judge said that he had rejected a defense request to exclude the press from every conference held with the jury absent, and would exclude the press only when there was a "substantial possibility that evidence [that] will not be put before the jury" was to be discussed (*id.* at 5-6, 31-32, 86). The reporter then left the courtroom without objection (*id.* at 6, 32-33).

2. On April 8 and 10, counsel for petitioner appeared and objected to the reporter's exclusion. The district judge explained that excluding the reporter was the only alternative he could discern to sequestering the jury, and that sequestration would create severe logistical problems and might require him to delay the trial for as much as several weeks while a sufficient number of marshals was made available (Pet. App. 42). Moreover, the judge explained, sequestration in this case might impose unusually serious hardships on the jurors because at the time they were selected they had not known they would be sequestered;[2] the judge pointed out that the consequence might be "deep

---

[2]For example, the court of appeals noted that "[o]ne juror, a pregnant woman, might have asked to be excused had she known sequestration was possible" (Pet. App. 7).

resentment against the Court, and perhaps the government, and perhaps the defendants in this matter, having results which will be unpredictable but clearly serious" (*id.* at 6-7).

The district judge canvassed the other possible alternatives to barring the newspaper reporter from the two conferences and explained why he believed them unsuitable (Pet. App. 8). He noted, for example, that it was impractical to send marshals to clip the jurors' newspapers, and that in any event that approach—or cancelling the jurors' newspaper subscriptions, a step petitioner was reluctant to endorse (*id.* at 51)—would be ineffectual because petitioner's accounts were carried by radio and television. The judge also stated that he could conduct the evidentiary conferences at the sidebar, in which case the press could undoubtedly be excluded, but that since there were at least seven defense attorneys involved in the trial (*id.* at 71-77), it would be "terribly inhibiting to whisper with the jury here when there are important things to be said which I want to think about and hear clearly" (*id.* at 45-46). Moreover, the judge said, the record of the case would be available immediately after the trial (*id.* at 45). The judge stated that while he was reluctant to restrict First Amendment rights at all (*id.* at 45, 89-90), he thought that the limited measure he was imposing was appropriate in this case (*ibid.*).

The district court invited petitioner's counsel to suggest alternatives, but counsel responded (Pet. App. at 52-53): "I guess I am back to sequestration. Emphatic instruction to the jury." When defense counsel unanimously and forcefully opposed sequestering of the jury and endorsed the exclusion of the press (*id.* at 53-57), the judge, after hearing further argument from petitioner's counsel, announced that he would continue his previous practice: motions to exclude the press would "not automatically be granted" but would be granted in a particular instance if there were a danger of inflammatory inadmissible evidence reaching the jury (*id.* at 58, 68).

3. Petitioner then sought a writ of mandamus to challenge the district judge's exclusion of the press from the conferences. The court of appeals denied relief, upholding the district court's decisions to exclude the press. The court of appeals held that the district judge "allowed the press an opportunity to object to closure[,] * * * gave careful and adequate consideration to less intrusive alternatives, * * * and made sufficient findings to support his rejection of them" (Pet. App. 17). The court of appeals noted that "[s]equestration might have been preferable if the trial had been shorter or if the need to exclude the press during the trial was known before the jury was impaneled," but it concluded that the judge acted reasonably in rejecting sequestration in this case (*id.* at 18 & n.3). Moreover, the court of appeals noted, "[e]xperience demonstrated that [petitioner] would publish inadmissible evidence that would come to the jurors' attention despite all precautions" (*id.* at 21). The court of appeals commented that petitioner should have suggested, as an alternative to the exclusion of the press, that it would agree not to publish the information it obtained at the conferences in question until some later time at which publication might not be prejudicial to the defendants (*id.* at 19).[3]

## ARGUMENT

1. Petitioner's reporters were excluded from only two brief conferences during the course of a lengthy trial. The conferences were concerned solely with the admissibility of potentially highly prejudicial information. There was clear evidence that petitioner would publish that information, if

---

[3]The court of appeals also ruled that the district judge erred in excluding only the press and not the public from the April 7 hearing (Pet. App. 22), but held that "[t]his error, taken in the context of a protracted trial in which the judge carefully balanced the First and Sixth Amendment rights, is insufficient to justify the issuance of the writ of mandate" (*id.* at 22).

it obtained it, in a form that could not reliably be kept from the unsequestered jurors. All the defendants opposed sequestration, and the district court gave specific reasons for considering sequestration inadvisable in the circumstances of this case. Moreover, it appears that the conferences from which the press was excluded could have been held at sidebar, were it not for the practical inconvenience of conducting an extended discussion on important matters in whispers; apparently no witnesses were called, for example. In these circumstances, petitioner's claim that the First Amendment barred its reporters' exclusion from the conferences is insubstantial.

In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Court held that criminal trials are presumptively open to the public. But this holding was based on a "long tradition of openness" (*id.* at 576 n.11 (plurality opinion))—an "unbroken, uncontradicted history" (*id.* at 573), throughout which trials have been "open to all who cared to observe" (*id.* at 564). See *id.* at 589, 597-598 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 601 (Blackmun, J., concurring). *Richmond Newspapers* therefore establishes only that the First Amendment "prohibit[s] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted" (*id.* at 576 (plurality opinion)).

Sidebar conferences, of course, have not been traditionally open to the public. While "a presumption of openness inheres in the very nature of a criminal trial under our system of justice" (448 U.S. at 573), the opposite is more nearly true of a conference between the judge and counsel on potentially prejudicial evidence. For that reason, "when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle"

(*id.* at 598 n.23 (Brennan, J., concurring)). Consequently, the right to attend trials established by *Richmond Newspapers* simply does not extend to conferences of the sort at issue here.

Moreover, petitioner's reporters were excluded from only a very limited portion of the trial, and their exclusion was fully justified by the specific exigencies of the situation. *Richmond Newspapers* makes it clear that such a limited restriction would be justified even in the context of proceedings that have historically been open. *Richmond Newspapers* "does not mean that the First Amendment rights of the public and representatives of the press are absolute. * * * [A] trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." 448 U.S. at 581 n.18 (plurality opinion); see *id.* at 600 (Stewart, J., concurring); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 400 (1979) (Powell, J., concurring). Indeed, an "overriding interest articulated in findings" (448 U.S. at 581) may even be sufficient to close a trial entirely.

Here, the district judge eschewed a blanket rule, carefully determined in each instance whether it was necessary to exclude the press, and did so only after determining that all other options were impractical. This sort of narrow, carefully tailored restriction on First Amendment rights has always been upheld when supported by substantial countervailing interests like those identified by the district judge. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), cited in *Richmond Newspapers* v. *Virginia*, *supra*, 448 U.S. at 581 n.18 (plurality opinion).[4] Moreover, the district judge

---

[4]Petitioner is simply mistaken in its suggestion (Pet. 10-11, 13) that only a threat to another constitutional right can justify restrictions on First Amendment privileges. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, ("[A] State's interest in protecting the

No. 80-795 (June 22, 1981), slip op. 9

had the clearest evidence that not excluding the press would create a danger that the unsequestered jury would be exposed to prejudicial inadmissible evidence. The district court carefully analyzed the costs of sequestering the jury—not only the financial costs to the government but the delay of the trial and the danger of causing resentment and speculation among the jurors—and chose instead the limited exclusion of the press from the equivalent of two sidebar conferences.[5] There is no reason for the Court to reassess these determinations by the trial judge. See *Gannett Co.* v. *DePasquale, supra*, 443 U.S. at 392-393; *id.* at 440-443 (Blackmun, J., dissenting).[6]

---

'safety and convenience' of persons using a public forum is a valid governmental objective" that can justify restrictions on activities protected by the First Amendment.) In any event, the interest justifying petitioner's exclusion from the conferences—the need to avoid disrupting the trial or prejudicing the jury—implicated the defendants' right to a fair trial, and therefore was of constitutional dimension.

[5]Petitioner argues (Pet. 13-18) that the court of appeals' suggested alternative—that the press agree not to publish information until it is no longer prejudicial—is inconsistent with the First Amendment. Since neither the district court nor the court of appeals ordered this alternative into effect, its validity is not before this Court, and petitioner's contention that it is unacceptable only reinforces the district court's conclusion that there was no alternative to excluding petitioner's reporters.

[6]Petitioner also attacks the district court's decision to exclude the press but not the public from the April 7 conference (Pet. 18-22)—a decision apparently based on the district court's preference for the narrowest possible restriction, one that excluded only those most likely to convey prejudicial information to the jury. Since the court of appeals disapproved this aspect of the district court's order (Pet. App. 22), the only reason petitioner can have for seeking review is its apparent belief that the court of appeals erred by not issuing a writ of mandamus to the district court on this point. But the trial was completed at the time that the court of appeals—which had jurisdiction only because the case was "capable of repetition, yet evading review"—issued its decision (see *id.* at 10), and petitioner suggests no reason to believe that the district judge, in the face of the court of appeals' explicit statements, will nevertheless adopt a practice of excluding the press but not the public. Consequently, the court of appeals' decision not to issue a writ of mandamus was entirely reasonable and does not merit review by this Court.

2. Petitioner further contends (Pet. 23-29) that the district court should have held a hearing, at which petitioner could present arguments, before closing either of the conferences. After the April 7 conference, the district court did hold two hearings, at which petitioner's counsel argued the issue extensively (Pet. App. 34-91). But petitioner asserts that a hearing should have been held before the press was excluded.

Petitioner, however, did not request a hearing before its exclusion from the two conferences in issue here. In both instances, orders closing the conferences were made in open court,[7] thus giving petitioner an opportunity to ask for a hearing before it was excluded. But petitioner was either silent or not present at the April 3 hearing.[8] Petitioner's reporter asked the judge to explain his April 7 order, and he received an explanation (Pet. App. 31-33)—a procedure which may itself have provided all the process to which petitioner was entitled (see *Gannett Co.* v. *DePasquale, supra*, 443 U.S. at 446 (Blackmun, J., dissenting)). In any event, petitioner did not request a fuller hearing at that time. Moreover, the April 3 order warned petitioner that

---

[7]In this respect, among others, this case differs from *United States* v. *Criden*, Nos. 80-2309 and 80-2482 (3d Cir. Mar. 26, 1982), where a decision to exclude the press and public from certain proceedings was not announced in open court (see slip op. 3). In addition, in *Criden* the court did not state its reason for closing a proceeding (see *id.* at 8), and the proceeding that was closed was apparently a far more significant part of the criminal trial than the conferences at issue here (see *id.* at 12-13).

[8]See *Gannett Co.* v. *DePasquale, supra*, 443 U.S. at 401 (Powell, J., concurring) (quoted at Pet. 26-27): "[R]epresentatives of the [press and public] must be given an opportunity to be heard on the question of their exclusion. But this opportunity extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public."

the district judge intended to exclude the press when necessary; petitioner thus had an additional opportunity to challenge the judge's practice before April 7. Even when petitioner's counsel appeared in the district court, on April 8 and 10, to contest the exclusion orders, they did not argue that the judge erred in not holding the hearing before entering the orders (see Pet. App. 81-82). Indeed, during the April 10 proceedings the district judge indicated his willingness to hold a prior hearing upon request (*id.* at 90-91). Consequently, in the current posture of this case, there is no reason to believe that the district judge would not honor petitioner's request for a prior hearing.

In addition, as we have said, petitioner was excluded only from two brief conferences held during a long and complex trial. Conducting a hearing before the exclusion might have significantly delayed the trial, especially if petitioner's counsel were afforded additional time to prepare. Had the district judge been persuaded, after the fact, that he erred in excluding the reporters, he could have made the transcript available to them at once and altered his practice if the issue arose again during the trial. Thus the harm to petitioner of delaying the hearing—even if petitioner had requested a prior hearing—was minimal, and the gains from avoiding delay may well have been significant. In these circumstances, the district court did not err in holding a thorough hearing immediately after, instead of before, he ordered petitioner's reporter excluded. See *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). See also *United States* v. *Gurney*, 558 F. 2d 1202 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *Central South Carolina Chapter* v. *Martin*, 556 F. 2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

CAROLYN L. GAINES
*Attorney*

APRIL 1982

DOJ-1982-04